No. 11557.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM GATHER KELLEY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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Jurisdictional Statement.

Appellant was indicted under Section 318 of Title 18 of the United States Code. The District Court had jurisdiction of the cause under Section 24 of the Judicial Code [28 U. S. C. 41(2)]. The offenses charged were committed in the City of Los Angeles [R. 17].[1] Judgment was entered on February 10, 1947 [R. 7-8]. Motion for a new trial was denied on February 17, 1947 [R. 10-11]. Notice of appeal was filed on February 18, 1947 [R. 12-14]. This Court has jurisdiction under Secion 128 of the Judicial Code (28 U. S. C. 225).

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[1]The references preceded by the symbol "R" are to the pages of the printed record on appeal.

Statute Involved.

Section 318 of Title 18 of the United States Code provides:

> "Whoever, being a postmaster or other person employed in any department of the Postal Service, shall unlawfully detain, delay, or open any letter, postal card, package, bag or mail intrusted to him or which shall come into his possession, and which was intended to be conveyed by mail, or carried or delivered by any carrier, messenger, agent, or other person employed in any department of the Postal Service, or forwarded through or delivered from any post office or station thereof established by authority of the Postmaster General; or shall secrete, embezzle, or destroy any such letter, postal card, package, bag, or mail; or shall steal, abstract, or remove from any such letter, package, bag, or mail, any article or thing contained therein, shall be fined not more than $500, or imprisoned not more than five years, or both."

Statement of the Case.

An indictment in two counts was returned by the Grand Jury, in the September, 1946, Term, and filed in the United States District Court for the Southern District of California, Central Division, charging appellant with violation of Section 318 of Title 18 of the United States Code [R. 2-3]. Count One charged that appellant, employed as custodial laborer by the United States Postal Service in the Los Angeles, California, Post Office, secreted and embezzled a package which came into his possession as such laborer and was intended to be conveyed

by mail [R. 2]. Count Two in similar language charged appellant with unlawfully detaining, delaying and opening a different package [R. 3].

Appellant pleaded not guilty [R. 3], and waived trial by jury [R. 4]. Appellant was tried on January 31, 1947, and found guilty by the court on both counts [R. 5-6].

On February 10, 1947, appellant was sentenced to two years' imprisonment on Count One, and sentence on Count Two was suspended and appellant placed on probation on condition he pay a fine of $500 and comply with the rules of the Probation Officer [R. 7-8].

Statement of Facts.

Appellant was employed as a custodial laborer by the United States Post Office Department [R. 152, 144-145]. Packages were disappearing in the areas in which appellant worked [R. 107]. On December 21, 1946, appellant was assigned to sweep and clean the southwest end of the third floor of the Terminal Annex Building in Los Angeles [R. 154, 145-146, 17-18], starting at 5 A. M. [R. 154, 65].

Postal inspectors had prepared two test packages [R. 60, 111]. Both bore cancelled postage stamps, and the names and actual addresses of living persons as addressees and senders [Gov. Exs. 2, 3; R. 18-19, 113-114]. Shortly after 5 A. M., on December 21, 1946, both packages were placed in the area appellant was to clean. One [Gov. Ex. 2] was put on the floor of a sack rack at the place on the third floor known as the "Pico Heights Sta-

tion," where papers and small packages for Pico Heights were worked [R. 22, 61, 64]. A sack rack is a metal rack on which mail bags are hung, and has a wooden floor under the bags about a foot off the floor, and is moveable [R. 23, 69]. The other package [Gov. Exs. 3 and 4] was placed on a tray in the circular and small package distribution section of Station E [R. 23, 61, 64]. The tray was on casters, and was used to hold mail, which would be taken out of it as it was moved to different stations [R. 24].

At about 5:30 A. M. appellant reached the sack rack in the Pico Heights Station, picked up the package from the sack rack, turned and tossed it about three feet onto his pile of sweepings, covered it up with two baskets of waste paper, and swept it away [R. 68-69, 141-142].

At about 6:00 A. M. the trash hamper that appellant had been using to collect his sweepings was examined [R. 27-31]. A trash hamper is a canvas tub on casters in which janitors collect their trash before taking it to the basement [R. 25, 75]. Both packages were found in the hamper [R. 163, 30-31, 55, 86-87]. The package which had been placed on the tray at Station E had been unwrapped, and the paper was found separate from the package [R. 33, 60-61, 87]. Appellant had been previously observed bending over his trash hamper for a period of about one-half minute, moving his hands around in it [R. 143, 75, 79, 130-131]. This opened package is referred to in Count Two of the indictment [R. 3, 19-20, 23]. The package picked up and thrown by appellant

into his trash is referred to in Count One [R. 2, 18, 22-23, 68-69].

Appellant had been instructed by his superior that he was not to touch mail at any of the places where mail was customarily put or kept, but that if he found any mail or packages on the floor or where it did not belong, he was to pick it up and put it on any of the tables and racks around there [R. 144].

On a prior occasion in June or July of 1946, appellant had swept away a package of between three and five pounds of butter, bearing stamps and an address on it, and the package was found in his hamper [R. 167-168]. On that occasion appellant was warned not to put anything in his hamper with stamps on it [R. 168].

Summary of Argument.

The packages here involved were "intended to be conveyed by mail" within the meaning of the statute even though they were "test" packages.

The evidence is clear that appellant secreted, detained, and delayed the packages here involved and took them into his possession.

The indictment was sufficient though it did not name the sender or state that the sender intended the packages to be conveyed by mail, and though it did not aver the ownership of the property in the packages, or that they were taken with felonious intent.

I.

That the Packages Were "Intended to Be Conveyed by Mail" Was Properly Alleged and Proven.

Appellant's principal attack is on the "test" packages. Appellant states that the evidence shows that the packages were not to be delivered to the addressees, and were not so delivered, so that they were not "intended to be conveyed by mail" within the statute (A. B. 7-12).[2] Appellant further argues that the indictment is insufficient for failure to name the sender, and for failure to allege that the sender intended the packages to be conveyed by mail (A. B. 14). Since these raise similar questions they will be discussed together.

The law has long been settled that the mere fact that a package is a decoy addressed to a fictitious addressee and hence undeliverable, does not prevent it from being "intended to be conveyed by mail" within the statute. Thus in *Goode v. United States,* 159 U. S. 663 (1895), a post office inspector caused an envelope which had been specially prepared and cancelled for the occasion to be placed directly in the box of the defendant letter carrier, thus bypassing the usual mailing and sorting process through which a regular letter would pass. The addressee of the letter was a fictitious person. The address, 153 Ziegler St., was also fictitious, but even if it were real, it was not on defendant's route, which only ran up to 51 Ziegler

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[2]References preceded by the symobl "A. B." are to the pages of Appellant's Opening Brief.

Street, so that defendant carrier's duty was to place it in the "list box," where off route letters were put. The court held that this was a "letter" within the statute (159 U. S. 669-670). This decision was followed in *Montgomery v. United States,* 162 U. S. 410 (1896), despite defendant's contention that there was a variance between the indictment, which alleged that the letters were to be conveyed by mail, and the proof, which was that the postal inspectors intended to intercept and withdraw the decoy letters before they reached their destination (162 U. S. 411).

In *Scott v. United States,* 172 U. S. 343, 347, 348-350 (1899), defendant requested the court to charge:

> " 'That a letter with an impossible address, which can never be delivered and which the sender, acting conjointly with post office officials, determined should be intercepted in the mail, is not such a letter as was, in the meaning of the statute, 'intended to be conveyed by mail.' "

The Supreme Court held that the refusal to so charge was proper, relying on the two prior Supreme Court decisions.

This has been followed in this circuit in *Jarrett v. United States,* 92 F. (2d) 698 (C. C. A. 9, 1937). In that case a decoy letter was prepared in the Los Angeles office so that it appeared to have arrived there from London. It was addressed to a fictitious person in Holly-

wood, and was placed on a table in the post office where mail was laid out. This Court said:

> "The question is: Was this letter, which was addressed to a fictitious addressee, and falsely purporting to be mailed in England, and received in San Francisco and Los Angeles, a letter which was 'intended to be conveyed by mail,' within the meaning of the statute?
>
> "The answer should be in the affirmative. The letter was intended to be conveyed by mail. It was contemplated that it should go through the regular channels in the post office, from the registry room to the customs division and back again. This is as much conveyance by mail as the carrying of a letter from one city to another. The intent to have the letter conveyed by mail is none the less effective because the addressee and the purported point of origin are fictitious."

To the same effect is *McShann v. United States,* 231 Fed. 923, 925-926 (C. C. A. 8, 1916).

The evidence is that the packages were prepared by the postal inspectors, addressed to live persons at real addresses, and bearing cancelled postage stamps [R. 60, 111, 18-19, 113-114]. One was then placed at the spot on the third floor where papers and small packages for Pico Heights were worked [R. 22, 61, 64], and the other in the circular and small package distribution section of Station E [R. 23, 61, 64]. As *Goode v. United States,* 159 U. S. 663, 665 (1895), indicates, the mere fact that the stamps were cancelled before the test packages were put out did not prevent the packages from being mail.

And as *Jarrett v. United States,* 92 F. (2d) 698 (C. C. A. 9, 1937) indicates, the mere intent that the test packages pass through a part of the post office in the regular routine is sufficient to satisfy the requirement that they be "intended to be conveyed by mail." The case makes it clear, as do all test package cases, that an intent that the mail be delivered to the ultimate addressee is not necessary. Here the packages were placed where packages were worked, and there is no evidence whatever that they were to be withdrawn from the mail at any time. In fact, the inspector indicated that, although the prime purpose was to discover who was stealing the mail, if the packages were not stolen they would have reached the addressees. A purpose was to see if they would reach the addressees [R. 113]. This is clearly sufficient under the statute.

Appellant's argument that the fact that these were decoy packages indicates that they were not intended to be conveyed by mail, is thus clearly not supported in law.

If, as these cases indicate, decoy packages with fictitious senders and addressees and which are to be intercepted before their delivery, are proper, it is apparent that an indictment need not name the sender, nor allege that the sender intended that the package be conveyed by mail to the person addressed. There would be no point in naming a fictitious sender, and such a fiction could hardly have any intent.

Appellant's objections to the decoy packages, and the failure of the indictment to specify the sender and the sender's intention, are without merit.

II.

The Evidence Is Clear That Appellant Secreted, Detained, Delayed and Opened the Packages.

Appellant also argues that even if appellant "had tossed the packages into his trash he would not have taken them out of the custodial custody of the Post Office or out of the mail" (A. B. 12), primarily because the Post Office operated a screening procedure in the basement for sorting mail out of the trash before the trash was burned [R. 135; A. B. 13]. Certainly appellant would not be guilty if he unintentionally swept up two packages in his trash, but such is not the case here. Two decoys were put out, and both were found in his hamper. He had been seen to pick up one and throw it into his trash [R. 68-69, 141-142], which he swept into his hamper. He had been seen to be bending over the hamper, working his hands in it [R. 143, 79, 75, 130-131], and one of the packages was found in his hamper opened [R. 33, 60-61, 87]. It is apparent that appellant diverted both packages into his trash, planning to open them at some time between sweeping them up and taking the trash from the third floor down to the incinerator and screening room in the basement. He succeeded in getting the wrapping off of one. From this the court could, and did, find that he secreted and embezzled the unopened package, and detained, delayed, and opened the opened package.[3]

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[3]Appellant, in an "Appendix" to its brief, presents its summary of the evidence. That summary is plainly insufficient. The testimony alone in this case covers over 150 pages of the record on appeal [R. 17-174]. Moreover, the appellate court, of course, does not weigh evidence or determine the credibility of witnesses, and the finding of the lower court will be sustained if there is substantial evidence, taking the view most favorable to the government, to support it. *Glasser v. United States,* 315 U. S. 60, 80 (1942).

It has long been settled that a package need not be taken out of the post office building before this crime is committed. *United States v. Marselis,* Fed. Cas. No. 15,724, 2 Blatchf. 108 (C. C., S. D. N. Y., 1849); *United States v. Nott,* Fed. Cas. No. 15,900, 1 McLean 499 (C. C. Ohio, 1839). Furtively and feloniously removing it from the place where it belongs, is sufficient.

III.

The Indictment Contains All the Elements of the Crime.

Appellant also attacks the indictment for failure to allege that the property embezzled belonged to someone other than defendant, or that there was a taking with wrongful or felonious intent (A. B. 15).

In prosecutions under the section here involved it is not necessary to allege in the indictment or to prove at the trial all the essential ingredients of the crime of larceny. See *Thompson v. United States,* 202 Fed. 401, 405 (C. C. A. 9, 1913); *United States v. Jolly,* 37 Fed. 108, 110-111 (D. C., W. D. Tenn., 1888). This is so because the gist of the offense is the breach of trust as to the mail. The statute is designed to protect the United States mails, not merely to punish thefts. The fact that the letter involved is addressed to someone other than the defendant shows a breach of trust.

Hence, it is not necessary to allege who is the owner of the letters or their contents. *United States v. Laws,* Fed. Cas. No. 15,579, 2 Lowell 115 (D. C. Mass., 1872);

United States v. Okie, Fed. Cas. 15,916, 5 Blatch. 516 (C. C., S. D. N. Y., 1867); *United States v. Baugh,* 1 Fed. 784, 788-789 (C. C., E. D. Va., 1880); *Walster v. United States,* 42 Fed 891, 893 (C. C., N. D. N. Y., 1890).[4]

Nor is it necessary to allege that the taking was done with felonious intent. The language of the statute is sufficient. *United States v. Atkinson,* 34 Fed. 316 (D. C., E. D. Mich., 1888).[5]

Count One alleged that appellant did "secrete and embezzle," and Count Two that he did "unlawfully detain, delay, and open." This language sufficiently alleged the crimes charged.

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[4]The same result has been reached under the companion statute (18 U. S. C. 317) covering secretion and embezzlement from the mail by anyone: *United States v. Trosper,* 127 Fed. 476 (D. C., S. D. Calif., 1904); *United States v. Falkenhainer,* 21 Fed. 624, 627 (C. C., E. D. Mo., 1884); *Bowers v. United States,* 148 Fed. 379 (C. C. A. 8, 1906); *Poffenbarger v. United States,* 20 F. (2d) 42, 44 (C. C. A. 8, 1927); *Collins v. United States,* 20 F. (2d) 574, 575 (C. C. A. 8, 1927).

[5]No allegation of felonious intent is necessary under R. S. 5469 (18 U. S. C. 317) covering stealing and embezzling mail by persons not employed in the Post Office. *United States v. Trosper,* 127 Fed. 476 (D. C., S. D. Calif., 1904); *United States v. Falkenhainer,* 21 Fed. 624, 627 (C. C., E. D. Mo., 1884).

Conclusion.

The objections raised by appellant are without merit. There can be a conviction based on test packages. The evidence sustains the conviction, and the indictment is sufficient. The conviction should be affirmed.

Respectfully submitted,

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